

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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MOEBIUS,

**Plaintiff,**

Case No. 2:21-cv-00970-ART-VCF

## ORDER

v.

TONY CARNEVALE; DESERT ART,  
LLC d/b/a CARNEVALE GALLERY;  
CAESARS ENTERTAINMENT, INC;  
and DOES 1 through 10 inclusive,

## Defendant.

Before the Court are two motions to dismiss for untimely service, one filed by Defendant Caesars Entertainment, Inc.’s (“Caesars”) (ECF No. 10) and another filed by Defendant Tony Carnevale and Desert Art, LLC d/b/a Carnevale Gallery’s (“Carnevale Gallery”) (ECF No. 12). Because this Court finds that the untimely service of the Complaint was attributable, at minimum, to excusable neglect, it exercises its discretion to retroactively extend the time for service and denies both motions.

Plaintiff Moebius brings a copyright infringement action against Caesars, Carnevale Gallery, and Carnevale. (ECF No. 1) According to the Complaint, Moebius is a visual artist who between 2017 and 2018 was a party to a consignment agreement with Carnevale Gallery, allowing it to display and sell his work, including an image that is registered with the United States Copyright Office. After the agreement terminated, Carnevale Gallery was no longer authorized to sell Moebius's work. In late 2019, Moebius received a photograph showing a counterfeit version of the registered image and his representative

1 confirmed that that Carnevale Gallery was displaying and selling the counterfeit  
2 image. Moebius alleges that he has a basis to believe that the Defendants have  
3 infringed additional works.

4 Moebius filed the Complaint on May 20, 2021 (ECF No. 1), but he did not  
5 serve Defendants within 90-days. On August 24, 2021, the Court issued a Notice  
6 regarding Intention to Dismiss Pursuant to Rule 4(m) (ECF No. 6) and provided  
7 Moebius until September 23, 2021, to file the proof of service showing that service  
8 had been made before “the expiration of the time limit set forth in Fed. R. Civ. P.  
9 4(m).” *Id.* The notice further advised that Moebius must show good cause for any  
10 delay in service and that failure to comply with the notice may result in dismissal  
11 of the action without prejudice. *Id.* Moebius complied with the notice, showing  
12 that he served Caesars Entertainment Inc. on September 15, 2021 (ECF No. 7)  
13 and Tony Carnevale and Desert Art, LLC on September 16, 2021. (ECF Nos. 8  
14 and 9.)

15 Defendants moved to dismiss arguing that Moebius failed to show good  
16 cause or excusable neglect justifying the untimely service of the Complaint. (ECF  
17 Nos. 10 and 12.) Federal Rule of Civil Procedure 4(m) offers two avenues of relief  
18 for a plaintiff, like Moebius, who misses the service deadline: The rule mandates  
19 an extension of time for plaintiffs who show good cause and authorizes an  
20 extension of time even in the absence of good cause where a plaintiff  
21 demonstrates excusable neglect. *Lemoge v. United States*, 587 F.3d 1188, 1198  
22 (9th Cir.2009). Thus, a plaintiff can preserve his original filing date for a  
23 complaint by satisfying one of two standards: good cause or excusable neglect.  
24 *Id.* Good cause is a more demanding standard in that it requires that (1) the  
25 defendant received actual notice of the lawsuit, (2) the defendant would suffer no  
26 prejudice, and (3) the plaintiff would be severely prejudiced if his complaint were  
27 dismissed. *Id.* (*citing Boudette v. Barnette*, 923 F.2d 754, 756 (9th Cir.1991)).  
28 Excusable neglect can rise to the level of good cause, forcing a mandatory

1 extension of time, if accompanied by the three good cause conditions (actual  
2 notice, lack of prejudice to the defendant, and severe prejudice to the plaintiff).  
3 *Lemoge*, 587 F.3d at 1198. Absent those conditions, a court can exercise its  
4 discretion to extend the service deadline based on excusable neglect attributable  
5 to negligence. See *Lemoge*, 587 F.3d at 1192. To determine when neglect is  
6 excusable, courts conduct the equitable analysis specified in *Pioneer Inv. Servs.*  
7 *Co. v. Brunswick Assoc. Ltd.*, 507 U.S. 380 (1993), by examining at least four  
8 factors: (1) danger of prejudice to the opposing party; (2) length of delay and its  
9 potential impact on the proceedings; (3) reason for the delay; and (4) whether the  
10 movant acted in good faith.” *Lemoge*, 587 F.3d at 1192 (internal citation and  
11 quotation marks omitted); *Pioneer*, 507 U.S. at 395.

12 Moebius has carried his burden of establishing, at minimum, excusable  
13 neglect for the delayed service. Moebius’s attorney, Mathew Higbee, explains  
14 that he delegates handling service of process to his paralegal, Ms. Ramirez.  
15 Around the time the Complaint was filed, Ms. Ramirez had a family member die  
16 from COVID-19 and took bereavement leave. Mr. Higbee first became aware that  
17 his paralegal had not handled service of the Complaint when he saw the notice  
18 issued by the Court. He asked of Ms. Ramirez whether she had handled service  
19 upon her return and she advised she had not. He instructed her to do so, and  
20 she did so within a few weeks. (ECF No. 14-1.) The reason for the delay and the  
21 good faith of Plaintiff’s counsel (the third and fourth *Lemoge* factors) establish  
22 excusable neglect. Though meeting deadlines is always the ultimate  
23 responsibility of the attorney, it common to delegate tasks such as coordinating  
24 service of process to support staff and the Court accepts the representations of  
25 Moebius’s counsel and his expression of contrition.

26 While there is some risk of prejudice to Defendants (the first *Lemoge*  
27 factor), the length of the service delay and its potential impact on the  
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1 proceedings (the second factor) appear to be limited. Defendants, who were  
2 served less than one month past the 90-day deadline, represent that the art  
3 gallery where the images are alleged to have been displayed was relocated  
4 sometime after the filing date and before they were served date. Since then, the  
5 old gallery location has been renovated and now is occupied by a new tenant.  
6 Defendants argue that the relocation may prejudice them because the evidence  
7 of exactly what was displayed, and where, cannot be recreated and the only  
8 images of the supposed conduct are the ones selected by Moebius. (ECF No. 12  
9 at 7.) It is unclear how prejudicial the relocation is, especially considering the  
10 availability of other evidence, including witness testimony and records.

11 Finally, Moebius could be severely prejudiced if his complaint were  
12 dismissed because he faces a three-year statute of limitations for copyright  
13 actions. *See Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 971 F.3d 1042, 1047  
14 (9th Cir. 2020) (citation omitted)(explaining that a copyright infringement claim  
15 accrues “when a party discovers, or reasonably should have discovered, the  
16 alleged infringement”). According to the Complaint, Moebius discovered the  
17 alleged infringement in “late 2019” (ECF No. 1 at 4.) At this stage in the  
18 proceeding there has been no conclusive resolution of the exact date the statute  
19 of limitations began to run, though there is at least some risk of prejudice due  
20 to dismissal for Mobius because any re-filed action may be time-barred.

21 Because Moebius has carried his burden of establishing, at minimum,  
22 excusable neglect for the failure to timely serve Defendants, the Court exercises  
23 its discretion to retroactively extend the time for service and declines to dismiss  
24 this action.

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1 IT IS THEREFORE ORDERED that Defendants' motions to dismiss (ECF  
2 Nos. 10 and 12) are DENIED.  
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DATED THIS 7<sup>th</sup> Day of July 2022.

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7 ANNE R. TRAUM  
8 UNITED STATES DISTRICT JUDGE  
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